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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CITY AND COUNTY OF SAN FRANCISCO, Petitioner, v. PUBLIC EMPLOYMENT RELATIONS BOARD, Respondent; TRANSPORT WORKERS UNION OF AMERICA, LOCAL 250, et al., Real Parties in Interest.	A152913 (Public Employment Relations Board Decision No. 2540-M Case No. SF-CE-827-M)

This case arises from an unfair practice claim filed by various unions after San Francisco voters passed Proposition G, which added subdivisions (o) and (q) to section 8A.104 of the Charter of the City and County of San Francisco. Section 8A.104, subdivision (o) (subdivision (o)) amended the interest arbitration procedures, and section 8A.104, subdivision (q) (subdivision (q)) altered the traditional use of side letters and past practices. The Public Employment Relations Board (PERB) ruled in favor of the unions and voided all but one sentence of subdivision (o) and the entirety of subdivision (q).

The City and County of San Francisco (City) filed a petition for writ of extraordinary relief with this court, alleging PERB applied the incorrect standard of review, erred in finding subdivisions (o) and (q) inconsistent with the Meyers-Milias-

Brown Act (MMBA; Gov. Code,[1] § 3500 et seq.), and imposed a remedy that was excessive, overbroad, and unreasonable. We agree PERB misstated the applicable standard of review and conclude PERB erred in finding the first, second, and fourth sentences of subdivision (o) and the first three sentences of subdivision (q) inconsistent with the MMBA. However, we affirm PERB's decision invalidating the third sentence of subdivision (o) and the fourth sentence of subdivision (q).

I. BACKGROUND

A. *The City Charter Prior to Proposition G*

The Charter of the City and County of San Francisco (City Charter) has long contained a "Transit-First Policy," which favors public transportation over reliance on private automobiles. The City Charter also contains provisions regarding labor relations for City employees.

Prior to Proposition G, section A8.404, subdivisions (a) through (f) of appendix A of the City Charter established the mechanism for calculating wages and benefits for City employees. These provisions, known as the "Salary Stabilization Ordinance," calculated wage levels and benefit contributions based on a survey of comparable transit districts.

In 1991, voters passed Proposition B, which amended the City Charter to allow unions the option to engage in collective bargaining on wages, hours, benefits, and other terms and conditions of employment. The collective bargaining process also included an impasse dispute resolution procedure incorporating interest arbitration, as well as a prohibition on the right to strike. The interest arbitration procedure allowed the arbitration panel to select the last offer that conformed most closely to a list of factors.

In 1994, voters passed Proposition F, which repealed the Salary Stabilization Ordinance for all City employees except safety employees, nurses, and transit operators. It also amended the interest arbitration procedure and allowed the arbitration panel to rule on an issue-by-issue basis rather than choosing one side's package last offer. Again, the arbitration panel was required to decide each issue based on various factors.

[1] All statutory references are to the Government Code unless otherwise indicated.

In 1999, Proposition E was passed, which established the Municipal Transportation Agency (MTA), made certain findings regarding transit services, and added additional factors relevant only to MTA interest arbitrations. The new Charter provisions included a finding that "unscheduled employee absences adversely affected customer service." (S.F. Voter Information Pamp. (Nov. 2, 1999) text of Prop. E, p. 100.) The provisions also added "the interests and welfare of transit riders, residents, and other members of the public" and "the Agency's ability to meet the costs of the decision of the arbitration board without materially reducing service" as new interest arbitration factors. (*Ibid.*)

B. *Proposition G*

In 2010, voters passed Proposition G, a signature initiative. Proposition G removed transit operators from the Salary Stabilization Ordinance and instead placed them under the City's collective bargaining/interest arbitration procedure, which applies to all other MTA employees. Proposition G also modified this interest arbitration procedure by adding subdivisions (o) and (q) to section 8A.104 of the City Charter.

Subdivision (o) finds "for transit system employees whose wages, hours and terms and conditions of employment are set by the Agency, the Agency's discretion in establishing and adjusting scheduling, deployment, assignment, staffing, sign ups, and the use and number of part-time transit system personnel based upon service needs is essential to the effective, efficient, and reliable operation of the transit system."[2] (S.F. Charter, § 8A.104, subd. (o).) Accordingly, this subdivision imposes on "an employee organization representing transit system employees . . . the burden of proving that any restrictions proposed on the Agency's ability to exercise broad discretion with respect to these matters are justified" in any mediation or arbitration proceeding under City Charter section 8.409-4. (S.F. Charter, § 8A.104, subd. (o).) This burden requires "the employee organization . . . prove by clear and convincing evidence that the justification for such

[2] Scheduling, deployment, assignment, staffing, sign-ups, and the use and number of part-time transit system personnel based upon service needs are jointly referred to as the "transit effectiveness factors."

restrictions outweighs the public's interest in effective, efficient, and reliable transit service and is consistent with best practices." (*Ibid.*) The subdivision further instructs any mediation or arbitration panel to "not treat the provisions of MOUs [(memorandum of understanding)] for transit system employees adopted prior to the effective date of this provision as precedential in establishing the terms of a successor agreement." (*Ibid.*)

Subdivision (q) finds "Agency service has been impaired by the existence of side-letters and reliance on 'past practices' that have been treated as binding or precedential but have not been expressly authorized by the Board of Directors or the Director of Transportation, and have not been and are not subject to public scrutiny." (S.F. Charter, § 8A.104, subd. (q).) The subdivision thus prohibits any "side-letter or practice within the scope of bargaining" from being "deemed binding or precedential by the Agency or any arbitrator unless the side-letter or practice has been approved in writing by the Director of Transportation or, where appropriate, by the Board of Directors upon the recommendation of the Director of Transportation and appended to the MOU of the affected employee organization or organizations . . . ." (*Ibid*.) The subdivision further provides, "No MOU or arbitration award approved or issued after the November 2010 general election shall provide or require that work rules or past practices remain unchanged during the life of the MOU" unless explicitly set forth in the MOU, and "All side-letters shall expire no later than the expiration date of the MOU."[3] (S.F. Charter, § 8A.104, subd. (q).)

C. *PERB Action*

Real parties in interest Transport Workers Union of America, Local 250; International Brotherhood of Electrical Workers, Local 6; Service Employees International Union, Local 1021; International Association of Machinist, Local 1414; and

[3] Proposition G also eliminated the formula used to calculate Muni (San Francisco Municipal Railway) employees' wages and benefits. Those provisions, however, were not challenged by the Unions and are not at issue in this appeal.

Transport Workers Union, Local 200[4] (jointly the Unions) filed an unfair practices charge (charge) against the MTA and the City. The charge alleged violations of PERB Regulation No. 32603, subdivision (f) (Cal. Code Regs., tit. 8, § 32603, subd. (f)), and the MMBA, specifically sections 3500, 3504, 3505, and 3507. The charge asserted subdivisions (o) and (q) imposed unique impasse resolution procedures and bargaining processes only upon MTA transit employees, which rendered the good faith bargaining procedure mandated by the MMBA impermissibly onerous and illusory. The Unions alleged subdivision (o) requires a mediation or arbitration panel "to rule in MTA's favor" by prohibiting the board "from adopting *any* Union proposals regarding the mandatory subjects of workforce scheduling, deployment, assignment, staffing, sign ups, and the use and number of part-time transit personnel *unless* the Unions are able to meet the impossible burden of proving with clear and convincing evidence that the Union proposals (1) outweigh the public's general interest in 'effective, efficient and reliable transit service' and (2) are consistent with unspecified 'best practices.' " The Unions contend such terms are not defined and thus "are so vague and ambiguous that they are meaningless." They argue content impasse resolution procedures are integral to resolving labor disputes, and "To comport with the MMBA's good faith bargaining requirement, a mandatory interest arbitration procedure must confer on the neutral arbiter full and unrestricted authority to resolve bargaining disputes as to all subjects within the scope of bargaining."

Similarly, the Unions asserted various employment terms were "memorialized in a host of unspecified side-letters and longstanding past-practices," which "are integral to the existing MOUs between MTA and its employee Union and are no less binding formal written terms of these agreements." They argue the requirement that such agreements be approved by the City's director of transportation provides the MTA "the unilateral right to decide which of these agreements and practices to maintain in place and which to

[4] Transport Workers Union, Local 200, were not signatories on the original charge but appear to have joined the action shortly thereafter.

jettison" in violation of the MMBA requirement to meet and confer in good faith regarding any changes to the terms and conditions of employment.

The City submitted a response to the charge filed with PERB. It argued Proposition G established local rules consistent with the MMBA. The City asserted these rules were procedural and "do not impose substantive limitations or burdens on the Unions' collective bargaining rights." The City contends Proposition G imposes a higher burden on the City than required by the MMBA because it requires the City to resolve impasse through binding interest arbitration rather than leaving the MTA board with final discretion to implement the last, best, and final offer after impasse.

PERB issued a complaint against the City. Paragraph No. 3 of the complaint stated the City "adopted Charter Section 8A.104[, subdivision] (o) regarding impasse dispute resolution procedures which states that employee organizations must prove by clear and convincing evidence that any proposals on scheduling, deployment, assignment, staffing, sign ups, and the use and number of part-time transit system personnel 'outweighs the public's interest in effective, efficient, and reliable transit service and is consistent with best practices.' " Paragraph No. 3 further stated the City "also adopted Charter Section 8A.104[, subdivision] (q) regarding past practices and side letters which declares these items not 'binding' on [the City] unless approved in writing by the Director of Transportation or, where appropriate, the Board of Directors." The complaint then stated the "policies as described in paragraph 3 are contrary to the [MMBA], and as such violate Government Code section 3507 and are an unfair practice under Government Code section 3509[, subdivision] (b) and PERB Regulation 32603(f)." The City filed an answer to the complaint, denying the allegations and raising various affirmative defenses.

A formal hearing was conducted by an administrative law judge (ALJ). After the hearing, the parties submitted posthearing opening and reply briefs.

The ALJ issued a proposed decision in favor of the Unions. In addressing subdivision (o), the ALJ explained the "discriminatory application of the burden of proof . . . conflicts with the notion that the parties begin negotiations on a level playing field, and remain there upon reaching impasse and entering the impasse resolution phase." The

ALJ also noted (1) the elevated burden of proof conflicts with the "free reign interest arbitrators are traditionally afforded," and (2) makes any union proposal that adds costs, administrative burdens, or restricts the MTA's discretion unlikely to prevail. He noted, "The arbitration panel must have the 'freedom to weigh the standards, to "mix the porridge," so to speak,' because the result depends on the way all of the standards are applied together." The ALJ concluded subdivision (o) "unreasonably abridges the unions' right to represent their unit members and frustrates the parties' duty to meet and confer in good faith under the MMBA."

As to subdivision (q), the ALJ noted side letters and past practices are binding and enforceable terms of employment. The ALJ stated subdivision (q) did not contain language limiting its effect to prospectively adopted side letters, and the "voidance of all previously unexpired side letters and past practices not formally adopted repudiates terms and conditions of employment and deprives the unions of their right to shape the meaning of ambiguous terms in their agreements . . . ." The ALJ further concluded the requirement that past practices be listed in any MOU cannot be unilaterally imposed because it abridges the unions' right to represent and impermissibly removes a subject from the scope of representation. Finally, the ALJ concluded subdivision (q) was problematic because the forced expiration of side letters at the expiration of the MOU conflicts with the MTA's duty to maintain the status quo until good faith negotiations have been completed.

Based on these holdings, the ALJ concluded the City should be subject to various cease and desist orders, as well as an order instructing the City to rescind subdivisions (o) and (q) from the City Charter. The ALJ further noted the City should be required to post a notice regarding the order.

The City filed 32 exceptions to the ALJ's proposed order. Upon considering these exceptions and the Unions' responses thereto, PERB issued a decision "conclud[ing] that the ALJ's findings of fact are supported by the record and his conclusions of law are well reasoned and in accordance with applicable law, except with respect to the remedial order." In addition to affirming the ALJ's ruling on the validity of Proposition G, PERB

also addressed two additional issues raised by the City: (1) the applicable standard of review, and (2) the home rule doctrine.

PERB rejected both arguments. It concluded the "no set of circumstances" rule advocated by the City applies to "a facial *constitutional* challenge to a statute." Instead, PERB explained, a test of reasonableness applies to an asserted conflict between local rules and the MMBA. PERB also held the home rule doctrine does not apply because it "does not permit a charter city to enact or enforce a local ordinance that conflicts or is inconsistent with the intent or purpose of the MMBA."

As to the remedial order, PERB agreed with the City it did not have authority to rescind, or order the City to rescind, a charter provision. Instead, it amended the ALJ's proposed order to declare subdivisions (o) and (q) void and invalid. However, PERB refused to sever any parts of subdivision (q), and only severed the last sentence of subdivision (o).

The City subsequently filed the current writ petition with this court.

II. DISCUSSION

A. *Standard of Review*

Our Supreme Court recently addressed the standard of review for an agency's legal determinations in *Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898: " 'When an agency is not exercising a discretionary rulemaking power but merely construing a controlling statute, " '[t]he appropriate mode of review . . . is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction. [Citation.]' [Citations.]" [Citation.] How much weight to accord an agency's construction is "situational," and greater weight may be appropriate when an agency has a " 'comparative interpretive advantage over the courts,' " as when " 'the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion.' " [Citation.] . . . Nevertheless, the proper interpretation of a statute is ultimately the court's responsibility.' " (*Id.* at p. 911.)

" '[C]ourts generally defer to PERB's construction of labor law provisions' " because "interpretation of a public employee labor relations statute ' "falls squarely within PERB's legislatively designated field of expertise," ' dealing with public agency labor relations." (*Boling v. Public Employment Relations Bd.*, *supra*, 5 Cal.5th at pp. 911–912.) " 'We follow PERB's interpretation unless it is clearly erroneous.' " (*Id.* at p. 912.) " ' "Even so, courts retain final authority to ' "state the true meaning of the statute." ' [Citation.] A hybrid approach to review in this narrow area maintains the court's ultimate interpretive authority while acknowledging the agency's administrative expertise." (*Ibid.*)

"[I]n reviewing PERB's findings ' "we do not reweigh the evidence. If there is a plausible basis for the Board's factual decisions, we are not concerned that contrary findings may seem to us equally reasonable, or even more so. [Citations.] We will uphold the Board's decision if it is supported by substantial evidence on the whole record." ' " (*Boling v. Public Employment Relations Bd.*, *supra*, 5 Cal.5th at p. 912.)

B. *The MMBA*

"The MMBA was enacted to 'provid[e] a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations.' [Citation.] The MMBA covers employees of any 'public agency,' a term that embraces all municipalities and local governmental subdivisions of the state, including counties. [Citation.] The statute grants public employees the right to form and join 'employee organizations' for the purpose of representation on matters of employer-employee relations." (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 329 (*County of Sonoma*).)

The MMBA articulates two main purposes: (1) "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations"; and (2) "to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for

recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies." (§ 3500, subd. (a).) Representation by employee organizations "include[s] all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment," and public agencies must "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations." (§§ 3504, 3505.)

The MMBA allows public agencies to adopt "reasonable" rules and regulations that provide "[a]dditional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment." (§ 3507, subd. (a)(5).) To the extent local rules are not reasonable, they are subject to "challenge" by an unfair practice charge before PERB. (§ 3507, subd. (d).)

C. *Validity of Proposition G*

1. Standard Applied by PERB

The City argues PERB failed to apply the proper standard in assessing facial challenges to the Charter. It contends a facial challenge, such as that raised here by the real parties in interest, must establish that no set of circumstances exists under which Proposition G would be valid. In response, PERB argues this "no set of circumstances" test only applies to constitutional challenges and a party challenging a local regulation under section 3507 must only demonstrate it is unreasonable, i.e., "[in]consistent with the policies or purpose of the MMBA."

"Although the vast majority of facial challenges to governmental enactments are on constitutional grounds, a facial challenge may be premised on the ground the enactment is inconsistent with statutory law." (*Beach & Bluff Conservancy v. City of Solana Beach* (2018) 28 Cal.App.5th 244, 260, fn. 9, citing *T.H. v. San Diego Unified School Dist.* (2004) 122 Cal.App.4th 1267, 1273, 1280–1285 [addressing facial challenge to administrative (school district) regulations on the ground they violated state law]; see *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 174 [facial

attack on ordinance "must show that the defective regulation presently poses a total and fatal conflict" with statute]; *PacifiCare Life & Health Ins. Co. v. Jones* (2018) 27 Cal.App.5th 391, 403 ["because PacifiCare has made a *facial* challenge to the validity of each regulation, it can prevail only if the text of the regulation, *on its face*, is inconsistent with the relevant statute[s]"].)

International Brotherhood of Electrical Workers v. City of Gridley (1983) 34 Cal.3d 191 (*City of Gridley*), cited by PERB, does not compel a different conclusion. In that case, certain city employees engaged in a strike the city considered illegal. (*Id.* at p. 196.) The city, pursuant to various local regulations, revoked the union's recognition as a bargaining representative and terminated the employees' employment with the city. (*Ibid.*) The parties disputed whether the city's action pursuant to its local regulations was "reasonable" because the petitioner argued the regulations violated former section 3507, which provided, " '[a] public agency *may adopt reasonable rules and regulations* after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under [the act].' " (*City of Gridley*, at p. 199, italics added by *Gridley*.) Former section 3507 further stated, " '[N]o public agency shall *unreasonably withhold recognition of employee organizations*.' " (*City of Gridley*, at p. 199, italics added by *Gridley*.) The California Supreme Court thus focused its analysis on whether the city's action conflicted with the statutory provisions requiring reasonableness. And the Supreme Court found the city's action "entirely inconsistent" with the statutory right of employees to form and join " 'employee organizations of their own choosing.' " (*Id.* at p. 202, fn. 12, italics omitted; accord *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 502–503 [city resolution excluded work schedule from meet and confer process; court found the resolution inconsistent with the reasonableness requirement of § 3507].)

We do not find *City of Gridley* at odds with the standard for assessing facial challenges. Rather *City of Gridley* instructs our interpretation of when an ordinance conflicts with the reasonableness requirement of section 3507. An as-applied challenge,

such as the one raised in *City of Gridley*, does not require any further analysis because the court is evaluating whether a specific set of actions conflict with section 3507. A facial challenge, however, requires us to adopt a broader perspective. Namely, to consider whether there are any circumstances under which the ordinance would not conflict with the reasonableness requirement of section 3507. This distinction was recognized by PERB in *Service Employees International Union, Local 817 v. County of Monterey* (2004) PERB Decision No. 1663-M, a case upon which it relies. There, PERB specifically noted: "[T]he ALJ did not find that the local rule at issue was unreasonable. Rather, the ALJ found that the local rule was unreasonable *as applied to the specific facts of this case*. It is this narrow ground upon which the ALJ's proposed decision is based and which the Board adopts." (*Id.* at p. 2, italics added.) Accordingly, the facial challenge at issue requires PERB to consider whether circumstances exist under which Proposition G would not conflict with the reasonableness requirement of section 3507.[5]

2. City Charter Section 8A.104, Subdivision (o)

With respect to subdivision (o), PERB concluded the first, second, third, and fourth sentences of that subdivision were unlawful. These sentences provide: "The voters find that for transit system employees whose wages, hours and terms and conditions of employment are set by the Agency, the Agency's discretion in establishing and adjusting scheduling, deployment, assignment, staffing, sign ups, and the use and number of part-time transit system personnel based upon service needs is essential to the

[5] As noted by our colleagues in the Fourth Appellate District, " 'The California Supreme Court has not articulated a single test for determining the propriety of a facial challenge. [Citation.] Under the strictest test, the [enactment] must be upheld unless the party establishes the [enactment] " 'inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions.' " [Citation.] Under the more lenient standard, a party must establish the [enactment] conflicts with constitutional principles " 'in the generality or great majority of cases.' " [Citation.] Under either test, the plaintiff has a heavy burden to show the [enactment] is unconstitutional in all or most cases, and " 'cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the [enactment].' " ' " (*Beach & Bluff Conservancy v. City of Solana Beach*, *supra*, 28 Cal.App.5th at p. 264.)

effective, efficient, and reliable operation of the transit system. In any mediation/arbitration proceeding under Section 8.409-4 with an employee organization representing transit system employees, the employee organization shall have the burden of proving that any restrictions proposed on the Agency's ability to exercise broad discretion with respect to these matters are justified. To meet this burden, the employee organization must prove by clear and convincing evidence that the justification for such restrictions outweighs the public's interest in effective, efficient, and reliable transit service and is consistent with best practices. The mediation/arbitration board shall not treat the provisions of MOUs for transit system employees adopted prior to the effective date of this provision as precedential in establishing the terms of a successor agreement." (S.F. Charter, § 8A.104, subd. (o).)

The City alleges various errors in PERB's decision invalidating these sentences of subdivision (o). The City first contends subdivision (o) is consistent with the MMBA because the MMBA allows the City to impose its "last, best, and final offer" and the MMBA does not impose requirements as to what criteria, or the weight of such criteria, may govern interest arbitration. The City next argues subdivision (o) must take precedence over the MMBA because it represents a substantive finding by voters regarding the importance of transit effectiveness. Finally, the City asserts invalidating subdivision (o) would amount to an unconstitutional delegation of authority. We address each argument in turn.

a. *Consistency with the MMBA*

i. Imposition of a "Last, Best, and Final Offer" Under the MMBA

The City contends subdivision (o) does not conflict with the MMBA because the MMBA allows it to impose its last, best, and final offer. Specifically, the City's position is that any form of interest arbitration—regardless of what restrictions the City may impose—affords unions the *possibility* of obtaining more favorable terms than those last offered by the City. Thus, according to the City, such interest arbitration cannot conflict

with the MMBA because the MMBA allows public agencies to unilaterally impose their desired terms in the event of impasse.

Undoubtedly, the MMBA allows a local agency to unilaterally impose its "last, best, and final offer." (§ 3505.7.) However, a local agency may only do so "[a]fter any applicable mediation and factfinding procedures have been exhausted" and if the public agency "is not required to proceed to interest arbitration." (*Ibid.*) Here, however, the City is subject to binding interest arbitration. (*City & County of San Francisco v. Stationary Engineers Local 39* (2009) PERB Decision No. 2041-M, at p. 2 [holding mandatory binding interest arbitration provisions were reasonable and thus enforceable].)

The City cites no authority to suggest it maintains such a right when a dispute is subject to interest arbitration. Rather, its argument is contrary to the express language of the MMBA, which only allows public agencies to do so when it "is not required to proceed to interest arbitration." (§ 3505.7.) If the City could reject contract proposals arising from binding interest arbitration and then impose its last, best, and final offer, the entire purpose of such arbitration is defeated. As aptly noted by PERB, "This argument ignores that under the binding interest arbitration procedure at issue here, the City's bargaining rights are tempered by the arbitration procedure."

ii. Imposition of a Heightened Burden of Proof

The City next argues subdivision (o) does not promote bad faith bargaining due to its requirement that unions meet a heightened burden of proof in any interest arbitration. The City contends it is "commonplace and unobjectionable" for public agencies to establish criteria to guide an arbitrator, and arbitrators inherently must weigh such factors. It asserts guidance on how arbitrators should weigh those factors is a natural extension of establishing criteria for arbitrators.

Neither party disputes the City is entitled to identify relevant criteria and factors that an arbitrator must consider in interest arbitration. Indeed, the PERB decision acknowledged "the establishment of criteria or factors to be considered by an arbitrator is commonplace and unobjectionable." Nor does the MMBA explicitly prohibit such factors. However, PERB concluded the City could not assign a greater weight to certain

criteria because any dispute resolution process must ensure fairness through the adoption of neutral rules of engagement. Specifically, it found the "discriminatory application of the burden of proof" problematic because it undermined the notion of a level playing field, potentially voided any consideration of the nontransit effectiveness factors, and harmed the parties' cooperative relationship.

Both federal and California precedents have emphasized the importance of maintaining balanced economic power in the bargaining process. For example, an early case before the United States Supreme Court, *Labor Board v. Insurance Agents* (1960) 361 U.S. 477 (*NLRB*), addressed whether the National Labor Relations Board (NLRB) could find a union had refused to bargain collectively as required by the National Labor Relations Act if it sought to put economic pressure on the employer through disruptive, on-the-job conduct during the negotiations. (*NLRB*, at p. 479.) The court concluded the NLRB lacked authority to limit the union's economic tools: "But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side. One writer recognizes this by describing economic force as 'a prime motive power for agreements in free collective bargaining.' Doubtless one factor influences the other; there may be less need to apply economic pressure if the areas of controversy have been defined through discussion; and at the same time, negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess." (*Id.* at p. 489, fn. omitted.) The court expressed concern that otherwise "the [NLRB] in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. And if the [NLRB] could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." (*Id.* at p. 490.)

Addressing a similar issue regarding a common law prohibition against public employee strikes, the California Supreme Court in *County Sanitation Dist. No. 2 v. Los*

Angeles County Employees' Assn. (1985) 38 Cal.3d 564 (*County Sanitation Dist. No. 2*) stated: "It is universally recognized that in the private sector, the bilateral determination of wages and working conditions through a collective bargaining process, in which both sides possess relatively equal strength, facilitates understanding and more harmonious relations between employers and their employees. In the absence of some means of equalizing the parties' respective bargaining positions, such as a credible strike threat, both sides are less likely to bargain in good faith; this in turn leads to unsatisfactory and acrimonious labor relations and ironically to more and longer strikes." (*Id.* at p. 583, fn. omitted.)

As the City notes, these cases address the ability of unions to strike or engage in other disruptive work behavior, whereas neither party here contends interest arbitration violates the MMBA by denying unions the right to strike. But the importance of *County Sanitation Dist. No. 2* and *NLRB*, which the City fails to acknowledge, is the emphasis on balanced bargaining power. At issue in those cases, and here, is a union's ability to obtain meaningful concessions during collective bargaining and fair resolutions through interest arbitration. If a local rule impedes union bargaining power—whether by punishing strikes or through other conduct—then it conflicts with the MMBA's fundamental purposes and is inconsistent with the reasonableness requirement of section 3507. (See, e.g., *City of Gridley*, *supra*, 34 Cal.3d at pp. 199–206 [rule sanctioning an unlawful strike by decertifying the recognized union was found to be unreasonable]; *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 502–503 [removal of negotiable subject from the scope of representation conflicts with the purpose of the MMBA]; *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 538–542 [rejecting a local policy restricting the employees' right to sue to enforce the MMBA over issues of impasse].)

Commentators have noted the important role a balanced interest arbitration process plays in ensuring effective collective bargaining. (See Anderson & Krause, *Interest Arbitration: The Alternative to the Strike* (1987) 56 Fordham L.Rev. 153, 155 ["either the right to strike or interest arbitration is needed to make collective bargaining

work"]; *id.* at p. 179 ["Interest arbitration enables the labor participants to retain the leverage necessary to bargain effectively in negotiating a contract."].) Here, the parties acknowledge the right to strike has long been banned by the City Charter. (See *Service Employees International Union Local 1021 v. City & County of San Francisco* (2017) PERB Decision No. 2536-M, p. 26, fn. 24.) Accordingly, the interest arbitration process must maintain its neutrality to provide the necessary leverage to ensure effective bargaining.

The "clear and convincing evidence" standard imposed by subdivision (o) fails to do so. It imposes an unreasonably high presumption that the City's discretion over the transit effectiveness factors would promote effective, efficient, and reliable transit service, while any union proposal would be detrimental to the transit effectiveness factors. Unions would need to prove "by clear and convincing evidence" that their position "outweighs the public's interest in effective, efficient, and reliable transit service and is consistent with best practices." (S.F. Charter, § 8A.104, subd. (o).) While a union could potentially overcome this hurdle, the "clear and convincing evidence" standard in subdivision (o) significantly tilts the outcome of any interest arbitration in the City's favor. This increased likelihood of success by the City in any interest arbitration, coupled with the union's preexisting inability to strike, unreasonably hampers a union's leverage in collective bargaining negotiations.

However, generally requiring unions to justify restrictions on the MTA's discretion as to the transit effectiveness factors does not necessarily constitute an unreasonable rule or regulation under the MMBA. (See § 3507, subd. (a)(5).) As a facial challenge to Proposition G, we must consider whether circumstances exist under which such a burden may not conflict with the reasonableness requirement of section 3507. Presumably, interest arbitrators already consider to what extent each side's position is justified and furthers the enumerated factors that must be considered. We thus cannot conclude the burden meaningfully alters the process as it already exists or is likely to

result in bad faith bargaining.[6] While we affirm PERB's holding that the third sentence of subdivision (o) ("To meet this burden, the employee organization must prove by clear and convincing evidence that the justification for such restrictions outweighs the public's interest in effective, efficient, and reliable transit service and is consistent with best practices.") violates the MMBA's mandate that public agencies promulgate "reasonable" rules and regulations "for the resolution of disputes involving wages, hours and other terms and conditions of employment" (§ 3507, subd. (a)(5)), PERB's conclusion that the first, second, and fourth sentences of subdivision (o) violate section 3507, subdivision (a)(5), was not supported by substantial evidence.

iii. Best Practices Under Subdivision (o)

For similar reasons as discussed in part II.C.2.a.ii., *ante,* we likewise find subdivision (o)'s reference to "best practices" problematic.

The City argues voters may require that transit services comply with "best practices," and such a requirement neither undermines the arbitrator's role in determining what constitutes a "best practice" nor is anti-labor.

If subdivision (o) merely instructed an arbitrator to consider the transit effectiveness factors in light of best practices, we may agree with the City. But it does not. Subdivision (o) requires unions to "prove by clear and convincing evidence" that the "justification for [any restrictions proposed on the Agency's ability to exercise broad discretion with respect to the transit effectiveness factors] . . . is consistent with best practices." (S.F. City Charter, § 8A.104, subd. (o).) Subdivision (o)'s reference to "best practices" incorporates the problematic burden of proof and presumptions in favor of the City's discretion over the transit effectiveness factors.

Moreover, subdivision (o)'s requirement that unions prove any restriction on the MTA's discretion is "consistent with best practices" sets an ambiguous hurdle. Neither

[6] We note the matter before us arises from a facial challenge to Proposition G, and does not present an as-applied challenge to the ordinance. Accordingly, this determination does not necessarily preclude parties from bringing as-applied challenges as may be appropriate.

subdivision (o) nor Proposition G, more generally, define what constitutes "best practices." The City, in fact, argues "what constitutes a 'best practice' " should be "left to the neutral arbitrator to determine." Subdivision (o) thus imposes on unions an unreasonable burden of proof that requires unions to speculate as to what may constitute "best practices." Accordingly, PERB properly found the reference to "best practices" in the third sentence of subdivision (o) unreasonable.

b. *Whether the Transit Effectiveness Factors Are Substantive*

The City next argues even if subdivision (o) is inconsistent with the MMBA, that inconsistency is trumped by the principles of home rule[7] because subdivision (o) reflects a substantive finding by voters regarding the importance of transit effectiveness. We disagree.

The City relies on *County of Sonoma, supra,* 173 Cal.App.4th 322 to argue PERB's decision places a substantive restriction on the City's ability to set the compensation of its employees. In *County of Sonoma,* the county entered into negotiations with the Sonoma County Law Enforcement Association (SCLEA) to establish a new MOU governing terms and conditions of employment. (*Id.* at p. 334.) After the parties reached impasse, the county refused to submit the dispute to interest arbitration and unilaterally implemented the county's last, best, and final offer. (*Ibid.*)

[7] Our Supreme Court explained the home rule doctrine in *State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 555–556: "Charter cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs. Article XI, section 5, subdivision (a) of the California Constitution provides: 'It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.' [Italics omitted.] . . . The provision represents an 'affirmative constitutional grant to charter cities of "all powers appropriate for a municipality to possess . . ." and [includes] the important corollary that "so far as 'municipal affairs' are concerned," charter cities are "supreme and beyond the reach of legislative enactment." ' "

SCLEA filed suit to force the county to arbitration under then-current Code of Civil Procedure section 1299 et seq., which mandated statewide interest arbitration and imposed the arbitration panel's decision unless the employer " 'by unanimous vote of all the members of the governing body reject[s] the decision of the arbitration panel . . . .' " (*County of Sonoma*, at pp. 335, 333.) The county argued Code of Civil Procedure section 1299 et seq. impermissibly infringed on its constitutional authority, including its exercise of home rule powers. (*County of Sonoma*, at p. 335.) The trial court upheld Code of Civil Procedure section 1299 et seq. and ordered the county to arbitration. (*County of Sonoma*, at p. 335.)

On appeal, Division Five of this district noted compensation of county employees is not a matter of statewide concern, but " ' "the maintenance of stable employment relations between police officers and their employers is a matter of statewide concern." ' " (*County of Sonoma*, *supra*, 173 Cal.App.4th at p. 339.) In discussing the leading California Supreme Court case on point, *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278 (*Riverside*), the court explained: "*Riverside* ' "emphasize[d] that there is a clear distinction between the *substance* of a public employee labor issue and the *procedure* by which it is resolved. . . . [Citation.]" ' [Citation.] It drew a sharp contrast between cases involving the Legislature's attempts to regulate actual wage and salary levels and those in which the Legislature had established only procedures governing labor relations. [Citation.] In the former category of cases, the court found that the Legislature had infringed upon the constitutional rights of other governmental entities. [Citations.] In the latter category of cases, the court had upheld the challenged statutes because they imposed only procedural safeguards and requirements, and had impinged only minimally on home rule powers protected by article XI [of the California Constitution]." (*County of Sonoma*, at pp. 339–340.) The court thus concluded Code of Civil Procedure section 1299 et seq. impermissibly interfered with the county's right to make a final decision on compensation because the unanimous vote requirement allowed a minority of its governing body to set employee compensation by making the arbitrators' decision final and binding upon the county. (*County of Sonoma*, at p. 346.) It found the statute

"imposes far more than a minimal burden on the democratic functions of local government. It therefore cannot be viewed as a mere procedural regulation of county labor relations." (*County of Sonoma*, at p. 348.)

We find *County of Sonoma* distinguishable. That opinion was grounded in the forced implementation of binding interest arbitration because, unlike here, the County of Sonoma had not adopted such dispute resolution procedures. Thus, Code of Civil Procedure section 1299 et seq. took away the county's right to implement its last, best, and final offer under the MMBA, and gave the decision on setting the terms and conditions of employment to the arbitration panel (the veto of which could be blocked by a single supervisor's vote). Here, however, the question is not whether terms and conditions of employment may be set by mandatory interest arbitration. The City has long agreed to such an approach. Rather, the question is whether voters may require the arbitration panel to adopt a presumption in favor of the City when conducting interest arbitration.

Riverside instructs us to consider whether subdivision (o) regulates actual wage and salary levels or only establishes procedures governing labor relations. (*Riverside, supra*, 30 Cal.4th at pp. 288–289; *County of Sonoma*, *supra*, 173 Cal.App.4th at p. 339.) And it is clear subdivision (o) only establishes procedures. The burden of proof imposed on unions when arguing in support of their labor proposal is undoubtedly part of the procedure by which MOU's are established. (See, e.g., *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 600–601, fn. 11 [" 'salaries of local employees of a charter city constitute municipal affairs and are not subject to general laws' " but "the process by which salaries are fixed is obviously a matter of statewide concern and none could, at this late stage, argue that a charter city need not meet and confer concerning its salary structure"].) The City indirectly acknowledges as much by recognizing a union could theoretically meet this burden. Accordingly, subdivision (o) is not inconsistent with the principles of home rule because it is merely procedural rather than substantive.

c. *Unconstitutional Delegation*

Finally, the City argues voters must be allowed to alter the terms of the interest arbitration process and provide additional guidance to arbitrators in order to prevent an unconstitutional delegation of legislative authority. In this instance, we disagree implementation of the third sentence of subdivision (o) is required to prevent an unconstitutional delegation.

" '[A]lthough it is charged with the formulation of policy,' the Legislature 'properly may delegate some quasi-legislative or rulemaking authority.' [Citation.] 'For the most part, delegation of quasi-legislative authority . . . is not considered an unconstitutional abdication of legislative power.' [Citation.] 'The doctrine prohibiting delegations of legislative power does not invalidate reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse.' [Citation.] Accordingly, '[a]n unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy.' " (*Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1146.)

Neither party contends mandatory interest arbitration, as it existed prior to enactment of subdivision (o), amounted to an unconstitutional delegation of legislative authority. We agree adequate guidance was in place to avoid such a conclusion. (See *Kugler v. Yocum* (1968) 69 Cal.2d 371, 384 ["Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation' "].) We further recognize situations may arise in which it is appropriate for a public agency or its voters to provide additional guidance to arbitrators, and the first, second, fourth, and fifth sentences of subdivision (o) provide such additional guidance. However, in the instant matter, voters sought to enact a provision, part of which fatally conflicts with the MMBA. (See part II.C.2.a., *ante*.) While voters may be able to modify the established safeguards to guide interest arbitration, they cannot do so

in a manner that is unlawful. And prohibiting the implementation of unlawful procedures does not turn a constitutional delegation of legislative authority into an unconstitutional one.

3. City Charter Section 8A.104, Subdivision (q)

In addressing the validity of subdivision (q), PERB adopted the ALJ's reasoning and found the second, third, and fourth sentences of subdivision (q) were unlawful. These sentences provide: "Accordingly, for employees whose wages, hours and terms and conditions of employment are set by the Agency, no side-letter or practice within the scope of bargaining may be deemed binding or precedential by the Agency or any arbitrator unless the side-letter or practice has been approved in writing by the Director of Transportation or, where appropriate, by the Board of Directors upon the recommendation of the Director of Transportation and appended to the MOU of the affected employee organization or organizations subject to the procedures set out in this charter. No MOU or arbitration award approved or issued after the November 2010 general election shall provide or require that work rules or past practices remain unchanged during the life of the MOU, unless the specific work rules or past practices are explicitly set forth in the MOU. All side-letters shall expire no later than the expiration date of the MOU." (S.F. Charter, § 8A.104, subd. (q).)

a. *The Unalleged Violations Doctrine*

As an initial matter, the City argues PERB improperly ruled on the third and fourth sentences of subdivision (q) because they were not alleged in the charge or corresponding complaint. As a result, those provisions were not noticed by the Unions, examined at the hearing, nor fully litigated. In response, PERB contends subdivision (q) was fully litigated.

The charge notes the employment terms and conditions of MTA transit employees are memorialized in written MOU's, which are supplemented by negotiated side letters and long-standing past practices. It asserts "Proposition G unlawfully dismantles decades of established agreements and practices by conferring on the MTA the unilateral right to decide which of these agreements and practices to maintain in place and which to jettison

through its mandate that these established 'laws of the shop' must be affirmatively restated and approved by the Director of Transportation and/or MTA Board of Directors to have any continued force and effect." The charge contends subdivision (q) violates the MMBA by excusing the City "from complying with [its] legal duty to meet and confer in good faith with its employees' representatives regarding terms and conditions of employment within the scope of bargaining, including any changes thereto."

"PERB Regulation 32640, subdivision (a) directs the issuance of a complaint if the charge is sufficient to establish a prima facie case. (Cal. Code Regs., tit. 8, § 32640 subd. (a).) As to the contents of the complaint, PERB Regulation 32640, subdivision (a) states: 'The complaint . . . shall state with particularity the conduct which is alleged to constitute an unfair practice. The complaint shall include, when known, when and where the conduct alleged to constitute an unfair practice occurred or is occurring, and the name(s) of the person(s) who allegedly committed the acts in question.' (Cal. Code Regs., tit. 8, § 32640, subd. (a).) [¶] With respect to deficiencies in a complaint, the regulation states '[PERB] may disregard any error or defect in the complaint that does not substantially affect the rights of the parties.' (Cal. Code Regs., tit. 8, § 32640, subd. (a).) It appears this provision is part of the foundation for PERB's unalleged violations doctrine." (*Superior Court v. Public Employment Relations Bd.* (2018) 30 Cal.App.5th 158, 192.)

Here, the allegations in the complaint were less detailed than those in the charge. The complaint stated the City "adopted [subdivision (q)] regarding past practices and side letters which declares these items not 'binding' on [the City] unless approved in writing by the Director of Transportation or, where appropriate, the Board of Directors. [¶] . . . [The City's] polices as described in [the preceding paragraph] are contrary to the [MMBA], and as such violate Government Code section 3507 and are an unfair practice under Government Code section 3509[, subdivision] (b) and PERB Regulation 32603[, subdivision] (f)."

"Under the unalleged violations doctrine, PERB has the discretion to consider allegations not included in the charge or the complaint if: (1) the respondent has had

adequate notice and opportunity to defend against the unalleged matter; (2) the unalleged conduct is intimately related to the subject matter of the complaint and is part of the same course of conduct; (3) the matter has been fully litigated; (4) the parties have had the opportunity to examine and be cross-examined on the issue; and (5) the unalleged conduct occurred within the same limitations period as those matters alleged in the complaint." (*Superior Court v. Public Employment Relations Bd.*, *supra*, 30 Cal.App.5th at pp. 192–193.)

The City first argues the third and fourth sentences, while related, are not *intimately* related to the second sentence. It alleges the requirement that the MTA board approve side letters and past practices is "separate and distinct" from the requirements that past practices be enumerated in an MOU and that any side letters expire concurrently with the relevant MOU. We disagree. All three sentences relate to the requirement that side letters and past practices be in writing, formally approved, and incorporated into an MOU. And the expiration of those side letters is an intimately related component of how side letters may take effect under subdivision (q). All three sentences are necessary to fully describe how side letters and past practices would operate under subdivision (q).

The City next contends the unalleged violations were not adequately noticed, examined at the hearing, or otherwise adequately litigated. The Unions' opening statement before the ALJ defines the subdivision (q) challenge in broad terms, namely, "the impact on existing side practices, side letters, and beneficial practices and such, and I think the evidence will show that that element of it effectively impairs existing practices that are as much as, as much a part of the contract as the express terms." Likewise, the City's prehearing submissions consistently discuss Proposition G in its entirety—not a select sentence within Proposition G. For example, the City's demurrer to the Unions' initial writ—which the City incorporated by reference into its position statement to PERB—stated, "Each cause of action rests on the same legal theory, namely, that Proposition G's amendments to the Charter violate the MMBA." It acknowledges, "The Unions also complain that Proposition G unlawfully nullifies unspecified side-letters and long-standing past practices which constitute the 'law of the shop' by conferring on the

MTA the unilateral right to determine which of these agreements and practices will be maintained and which will be abolished."

Moreover, the Unions' posthearing opening brief expressly took issue with the third and fourth sentences of subdivision (q). They argued, for example, "prohibiting the parties from using past practices or side letters excludes mandatory subjects from bargaining and is unreasonable and unlawful," and asserted "Proposition G's requirement that '[a]ll side-letters shall expire no later than the expiration date of the MOU' facially conflicts with the MMBA's basic requirement that employers may not alter the terms and conditions of employment upon or after contract expiration without good faith negotiations." The City's posthearing reply brief did not assert these issues were outside the scope of the charge or complaint at issue. Rather, the City disputed the Unions' argument that Proposition G rescinds existing contractual agreements or excludes mandatory subjects from bargaining. The City argued, "Proposition G requires only *what is already expressly required under the MMBA*" and "simply ensures agreements on these issues are not undermined by unauthorized representatives, but instead are memorialized and agreed to as part of the public, transparent process that accompanies the agreement to, and approval of, collective bargaining agreements." Read together, it was appropriate for PERB to conclude the City was on notice that the Unions were contesting the entirety of subdivision (q).

We further note the City has not identified any prejudice resulting from the imprecise allegations of the charge and subsequent complaint. "The prejudice element is important because the ' "charge need not be technically precise so long as it generally informs the party charged of the nature of the alleged violations" ' and, thus, whether an unalleged violation is properly considered turns on whether the changes prejudiced [the employer]." (*Superior Court v. Public Employment Relations Bd.*, *supra*, 30 Cal.App.5th at p. 193.) While the City argues subdivision (q) was not fully litigated because it did not present evidence on the validity of subdivision (q)'s third and fourth sentences, the City has not identified *what* evidence it would have presented on the issue. As the City repeatedly notes, the Unions raised a facial challenge to Proposition G, not an as-applied

challenge. Accordingly, subdivision (q)'s validity raises a legal question rather than a factual one. And, at a minimum, the City had a full opportunity to argue the legal merits of Proposition G's validity in its posthearing reply brief once the Unions raised specific arguments as to all sentences in subdivision (q).

b. *The Validity of the Second and Third Sentences of Subdivision (q)*

The City challenges PERB's conclusion that subdivision (q) violates the MMBA because it "immediately and retroactively invalidates all previously negotiated side letters and past practices." PERB contends side letters and past practices are binding terms of employment, and subdivision (q)'s attempt to repudiate those existing side letters and past practices violates the City's obligation to meet and confer in good faith.

" '[S]tatutes ordinarily are interpreted as operating prospectively in the absence of a clear indication of a contrary legislative intent. [Citations.] In construing statutes, there is a presumption against retroactive application unless the Legislature plainly has directed otherwise by means of " 'express language of retroactivity *or* . . . other sources [that] provide a clear and unavoidable implication that the Legislature intended retroactive application.' " [Citations.] Ambiguous statutory language will not suffice to dispel the presumption against retroactivity; rather " 'a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.' " ' " (*DD Hair Lounge, LLC v. State Farm General Ins. Co*. (2018) 20 Cal.App.5th 1238, 1245; see *City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 420 ["Departure from the presumption of prospectivity is warranted only by clear legislative intent. [Citation.] Thus, 'in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application.' "].) " 'We review the retroactive application of the statute de novo.' " (*City of San Jose*, at p. 421.)

Here, the legislative history does not indicate voters intended subdivision (q) to apply retroactively. PERB argues subdivision (q) repudiates existing side letters based on language in the ballot materials which stated Proposition G would " 'press the reset button' on existing work rules, which create inefficient and unreliable service for riders."

(S.F. Voter Information Pamp. (Nov. 2, 2010) argument in favor of Prop. G., p. 110.) While ballot materials are presumed to reflect the voters' intent (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 49), this statement hardly "provides a clear and unavoidable implication" that voters intended subdivision (q) to apply retroactively. (See *DD Hair Lounge, LLC v. State Farm Gen. Ins. Co., supra,* 20 Cal.App.5th at p. 1245.) In fact, nothing in these materials clearly indicates subdivision (q) would apply to current MOU's and related side letters and practices. The reference to "existing work rules" arguably contextualizes *what* rules would be impacted in the future, not when they would be impacted.

Due to the lack of any clear retroactive intent, we conclude subdivision (q) only applies prospectively. And such prospective application does not amount to a unilateral alteration of terms and conditions of employment.

"[U]nder standards established by PERB, to prevail on a complaint of illegal unilateral change, the union must establish: (1) the employer breached or altered the parties' written agreement, or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy, i.e., the change has a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment; and (4) the change in policy concerns a matter within the scope of representation." (*California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 935.) Because subdivision (q) only applies prospectively, PERB and the Unions cannot establish the second element—lack of "notice or an opportunity to bargain over the change." While negotiating future MOU's, unions are fully able to bargain over all of the terms and conditions of their employment, including those traditionally encompassed in side letters or past practices.

Moreover, we note the ALJ's decision, which PERB adopted, recognized subdivision (q) may be lawful when applied prospectively. The ALJ acknowledged, "As a matter of labor relations protocol, an employer may require that side letters be executed

by only certain representatives . . . ." Likewise, the ALJ recognized "it is permissible for the City to propose that past practices clauses operate within this limitation of specific inclusion in the MOU," provided it is not unilaterally imposed.

PERB now argues subdivision (q) would be inconsistent with the MMBA even if it were only applied prospectively. It asserts current law makes past practices binding under certain circumstances, subdivision (q) imposes additional conditions impacting when those practices would be binding, and thus subdivision (q) violates the City's meet and confer obligations. We disagree that subdivision (q) imposes additional conditions impacting when past practices may be binding. As set forth in *Riverside Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291, a case relied upon by PERB, past practices are not binding if they cannot be " 'readily ascertainable . . . as a fixed and established practice accepted by both parties.' " Subdivision (q) does not alter this requirement, but rather specifies when a past practice may be considered "an established practice accepted by" the City. Specifically, subdivision (q) clarifies a past practice is only "accepted by" the City if it is incorporated into the written MOU. And, because subdivision (q) only applies prospectively, unions will have the opportunity to bargain over these terms.[8] We thus find the required inclusion of past practices within an MOU and approval of side letters do not amount to an illegal unilateral change. Accordingly, we conclude the second and third sentences of subdivision (q) do not conflict with the MMBA.

[8] The Unions appear to argue side letters and past practices continue indefinitely, and thus subdivision (q) inherently and unilaterally invalidates these unexpired side letters and past practices. However, side letters and past practices do not operate in a void, but rather to supplement and explain specific MOU's. As noted in this and subsequent sections, subdivision (q) does not apply retroactively and the City has a duty to maintain the status quo until good faith negotiations are completed. The Unions fail to explain why subdivision (q) should not apply once a new MOU has been established, either through mutual agreement or interest arbitration.

c. *The Fourth Sentence of Subdivision (q)*

The fourth sentence of subdivision (q) provides for the forced expiration of all side letters, including those properly adopted pursuant to subdivision (q), at the expiration of the MOU. Specifically, it states: "All side-letters shall expire no later than the expiration date of the MOU." (S.F. Charter, § 8A.104, subd. (q).)

PERB noted this provision "conflicts with the MTA's duty to maintain the status quo until good faith negotiations have been completed." In *Council of Classified Employees/AFT, Local 4522 v. Palomar Community College District* (2011) PERB Decision No. 2213, PERB held that side letters bind parties to the practices contained therein and do not expire automatically at the expiration of the parties' MOU. The City does not raise any argument for why such a provision would be lawful in light of its duty to maintain the status quo during good faith negotiations. (See *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948 [may treat argument as waived or abandoned when brief fails to contain legal argument with citation to authorities].) Accordingly, we find PERB properly found the fourth sentence of subdivision (q) unlawful.

D. *Remedy Imposed by PERB*

Proposition G contains a severance clause, which states: "This Charter Amendment shall be interpreted so as to be consistent with all federal and state laws, rules, and regulations. If any section, sub-section, sentence, or clause ('portion') of this Amendment is held to be invalid or unconstitutional by a final judgment of a court, such decision shall not affect the validity of the remaining portions of this Amendment. The voters hereby declare that this Amendment, and each portion, would have been adopted irrespective of whether any one or more portions of the Amendment are found invalid." (S.F. Voter Information Pamp. (Nov. 2, 2010) text of Prop. G, p. 182.) Despite this severance clause, PERB concluded only the final sentence of subdivision (o) was severable and noted the other sentences were not severable "because they are functionally inseparable from the rest of the subdivision." Likewise, PERB concluded the third and fourth sentences of subdivision (q) were not severable because they constituted unalleged violations and were "inextricably entwined with the second sentence."

"The presence of [a severability] clause establishes a presumption in favor of severance. [Citation.] We will, however, consider three additional criteria: '[T]he invalid provision must be grammatically, functionally, and volitionally separable.' [Citation.] Grammatical separability, also known as mechanical separability, depends on whether the invalid parts 'can be removed as a whole without affecting the wording' or coherence of what remains. [Citations.] Functional separability depends on whether 'the remainder of the statute " 'is complete in itself . . . .' " ' [Citation.] Volitional separability depends on whether the remainder ' "would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute." ' " (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 270–271.)

1. Severability of Subdivision (o)

The City argues only the third sentence of subdivision (o) was challenged by the Unions. The sentence states: "To meet this burden, the employee organization must prove by clear and convincing evidence that the justification for such restrictions outweighs the public's interest in effective, efficient, and reliable transit service and is consistent with best practices." (S.F. Charter, § 8A.104, subd. (o).) The City asserts this one sentence could be severed and the remainder of subdivision (o) upheld.

As an initial matter, we disagree with the City's interpretation of the charge.[9] However, this issue is irrelevant in light of our conclusion that only the third sentence of subdivision (o) is invalid.

Next, we must consider whether the third sentence of subdivision (o) may be severed from the remaining sentences of subdivision (o). As a complete sentence, it is obviously grammatically separable. Likewise, the sentence is volitionally separable because Proposition G expressly states, "The voters hereby declare that this Amendment,

[9] The charge makes much broader allegations and challenges the entirety of subdivision (o), including various broad statements about Proposition G's "impermissibly onerous and illusory" and "one-sided" interest arbitration rules and the general impact of subdivision (o). These allegations relate to the entirety of the new interest arbitration rules set forth in subdivision (o).

and each portion, would have been adopted irrespective of whether any one or more portions of the Amendment are found invalid." (S.F. Voter Information Pamp. (Nov. 2, 2010) text of Prop. G, p. 182.)

We also conclude the third sentence is functionally separable, and " 'the remainder of the statute " 'is complete in itself . . . .' " ' " (*California Redevelopment Assn. v. Matosantos, supra*, 53 Cal.4th at p. 271.) The third sentence is not integral to the meaning and intent of the remaining sentences. The first sentence identifies the importance of the transit effectiveness factors, and its completeness is not impacted by the third sentence. Likewise, the fourth sentence addresses how arbitration boards treat prior MOU's and past practices. This sentence does not relate to the burden of proof at issue in the third sentence, and thus cannot impact the severability of the third sentence. The more problematic sentence, however, is the second sentence. The second and third sentences, read together, impose the union's burden of proof as to the transit effectiveness factors and establish how arbitration panels must impose that burden. Undoubtedly, these sentences are closely related and serve to instruct arbitration panels on how to incorporate the new transit effectiveness factors into an interest arbitration. However, we ultimately conclude the third sentence is functionally separable from the second sentence. Arbitrators could potentially apply the burden of proof as appropriate, without needing the specific guidance provided in the third sentence. Accordingly, we conclude the third sentence in subdivision (o) is severable from the remaining sentences in subdivision (o).[10]

2. Severability of Subdivision (q)

Based on its conclusion that subdivision (q) was unreasonable, PERB declared the entirety of that subdivision void.

[10] We do not consider whether PERB appropriately severed the fifth sentence of subdivision (o) because neither party contests that aspect of the remedy.

As discussed in part II.C.3., *ante*, PERB erred in concluding subdivision (q) conflicted with the MMBA apart from the fourth sentence. Accordingly, we also reverse PERB's order voiding subdivision (q) in its entirety.

We conclude the void fourth sentence, which states, "All side-letters shall expire no later than the expiration date of the MOU," is severable from the remainder of subdivision (q). (S.F. Charter, § 8A.104, subd. (q).) The sentence is both grammatically and functionally separable, as it does not impact the wording or coherence of the remaining sentences or cause the remainder of subdivision (q) to be incomplete. (See *California Redevelopment Assn. v. Matosantos*, *supra*, 53 Cal.4th at p. 271.) The sentence also is volitionally separable based on Proposition G's statement that "each portion[] would have been adopted irrespective of whether any one or more portions of the Amendment are found invalid." (S.F. Voter Information Pamp. (Nov. 2, 2010) text of Prop. G, p. 182.)

3. Posting Requirement

Finally, the City contends PERB's order that it post copies of the notice "at all work locations in the City, where notices to employees customarily are posted" is burdensome, impractical, and unnecessary. The City argues this order conflicts with PERB's usual practice of limiting the required posting to locations where members of the affected units are employed. In response, PERB asserts the City waived this argument by failing to object to this portion of the ALJ's proposed order.

PERB Regulation section 32300 provides the manner in which a party may file exceptions to an ALJ's proposed decision. It requires the statement of exceptions shall "(1) State the specific issues of procedure, fact, law or rationale to which each exception is taken; [¶] (2) Identify the page or part of the decision to which each exception is taken; [¶] (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception; [and] [¶] (4) State the grounds for each exception." (Cal. Code. Regs., tit. 8, § 32300, subd. (a)(1)–(4).) "An exception not specifically urged shall be waived." (*Id.*, § 32300, subd. (c).)

While the first sentence of the City's exception No. 31 of its "Statement of Exceptions to Proposed Decision" states the proposed decision's "remedy is excessive, overbroad and in itself unreasonable," the remainder of the paragraph contests the order to rescind and severability. It then references the City's supporting brief, which also only discusses rescission and severability. Accordingly, the City failed to preserve the posting issue for appeal.[11]

III. DISPOSITION

The writ for extraordinary relief is granted and the portions of the PERB decision invalidating the first, second, and fourth sentences of City Charter section 8A.104, subdivision (o) and the first three sentences of City Charter section 8A.104, subdivision (q) are set aside. The portion of the PERB decision invalidating the third sentence of City Charter section 8A.104, subdivision (o) and the fourth sentence of City Charter section 8A.104, subdivision (q) is not set aside.

[11] The case relied upon by the City, *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, is distinguishable because it did not involve PERB or the applicable regulations at issue.

_____
Margulies, Acting P. J.

We concur:

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Banke, J.

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Sanchez, J.

A152913